A

DAVID WEE ENG SIEW

v.

LIM LEAN SENG & ANOR

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
C AHMAD MAAROP FCJ
[CIVIL APPEAL NO: 02-92-11-2012(P)]
17 OCTOBER 2013

TRUSTS: *Will - Residuary clause - Trust property - Intention to create*
D *trust - Testator's trust expired upon death of last surviving trustee - Whether residuary clause in will included property which testator did not own at time of death - Whether remainder of testator's property distributed to person or persons he intended to bequest - Whether interest held by executors cum trustees was by way of resulting trust - Whether*
E *surplus land distributed in accordance with wishes of testator - Failure to draft residuary clause - Whether remainder of property will pass by way of intestate*

Real property, initially held by one Lim Leng Cheak ('LLC'), was
F vested in his widow, Madam Tan. By an indenture, Madam Tan transferred the property to her son, Lim Eow Thoon ('testator') and *vide* an indenture dated 17 September 1930, the latter evinced an intention to create a trust. The properties involved in the trust were 13 pieces of land ('the lands'). The parties involved
G in the said indenture were, Madam Tan as the transferor, Lim Eow Thoon as the testator and Lim Eow Hooi, Lim Keng Chuan and Lim Seong Wah as trustees of the lands. The purpose of the trust was to maintain and keep the lands as burial grounds. The lands were used for the benefit of the family and the descendants
H of LLC. Prior to his death, the testator made his last will and testament on 14 August 1976. There were provisions in his will which provided for the legacy and distribution of the residuary properties. The last surviving trustee died on 28 March 1983. In 1996, the High Court declared that the testator's trust expired on
I 28 March 1983 and the lands were reverted and vested unto the executors cum trustees of the testators, who were the respondents in this case. The appellant, who was the administrator of the

estate of one Lim Eang Tee ('LET)', surfaced and began to make demands. LET was the daughter of the testator. In the High Court, the appellant filed an application pursuant to O. 80 of the Rules of the High Court 1980 ('RHC') for a decision on points of law, namely, (i) whether trust properties, at the time of the settlor's death, had a depository effect; and (ii) whether trust properties that resulted back to the settlor but long after his death would fall under intestacy. It was the appellant's notion that the surplus land should be distributed intestate rather than being part of the testator's residuary estate in the will. On the other hand, the respondents filed an application under O. 14A of the RHC to determine certain questions of law, *ie*, (i) whether the lands that were held on trust by the trustees had to be distributed to the residuary legatees stated in the last will of the testator; and (ii) in the event the lands go to the residuary legatees, the appellant's whole claim be dismissed with costs. The learned judge answered the respondents' application in the affirmative and dismissed the appellant's application. On appeal, the Court of Appeal dismissed the appellant's appeal. Hence, this appeal. It was the appellant's argument that there was an interest which remained undisposed when the trust came to an end on 28 March 1983 and the interest held by the respondents as executors cum trustees was by way of a resulting trust. The issue that arose for consideration in this appeal was whether a residuary clause in a will includes property which the testator did not own at the time of his death.

Held (dismissing appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) To overcome any unfinished business of residual property, a legal method may be devised, *ie*, by the usage of provisions in the will called the residuary clause whereupon the remaining property will be disposed of. Such a residuary clause addresses any remaining property, after all the debts, taxes, expenses and specific bequests and devises have been fully settled. This residuary clause ensures that the remainder of the testator's property is distributed to the person or persons he intends to bequest. Any failure to draft such residuary clause or a comprehensive residuary clause will cause the remainder of the property to pass by intestate succession. (paras 19 & 21)

(2) The testator had not totally abandoned the trust property, as he too would eventually be a beneficiary of a burial plot. Thus, the equitable interest remained with the testator at the time of his death, and the surplus land could be bequeathed and devised by his will pursuant to s. 3 of the Wills Act 1959. On the facts, the surplus land formed part of his residual estate and with such residuary clause, the surplus land fell under them and was distributable in accordance with the wishes of the testator. Intestacy therefore had no place in this case, unlike a situation where a will contains no residuary devise causing it to pass on intestate *(Re Wragg (deceased)*; dist). (paras 32 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Hartanah, yang pada mulanya dipegang oleh satu Lim Leng Cheak ('LLC'), diletak hak atas balunya, Madam Tan. Melalui satu indentur, Madam Tan telah memindah milik hartanah tersebut kepada anak lelakinya, Lim Eow Thoon ('pewasiat') dan melalui indentur bertarikh 17 September 1930, pewasiat berniat untuk mewujudkan satu amanah. Hartanah-hartanah yang terlibat dalam amanah itu merupakan 13 bidang tanah ('tanah-tanah'). Pihak-pihak yang terlibat dalam indentur tersebut adalah Madam Tan sebagai pemindah milik, Lim Eow Thoon sebagai pewasiat dan Lim Eow Hooi, Lim Keng Chuan dan Lim Seong Wah sebagai pemegang-pemegang amanah tanah tersebut. Fungsi amanah itu adalah untuk menyenggara dan menyimpan tanah-tanah itu sebagai tapak pengebumian. Tanah-tanah itu digunakan untuk kepentingan keluarga dan keturunan LLC. Sebelum kematiannya, pewasiat telah membuat wasiat terakhirnya pada 14 Ogos 1976. Terdapat peruntukan dalam wasiat beliau yang menyediakan untuk legasi dan pengagihan bahagian bagi baki hartanah. Pemegang amanah terakhir telah meninggal dunia pada 28 Mac 1983. Pada tahun 1996, Mahkamah Tinggi telah mengisytiharkan bahawa amanah pewasiat telah luput pada 28 Mac 1983 dan tanah-tanah dikembalikan dan diletak hak atas wasi merangkap pemegang amanah pewasiat, yang merupakan responden-responden dalam tindakan ini. Perayu, yang merupakan pentadbir estet satu Lim Eang Tee ('LET)', telah membuat tuntutan. LET merupakan anak perempuan pewasiat. Di Mahkamah Tinggi, perayu telah memfailkan permohonan di bawah A. 80 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas beberapa perkara undang-

undang, iaitu, (i) sama ada hartanah amanah pada masa kematian pembuat amanah mempunyai kesan depositori; dan (ii) sama ada hartanah amanah yang dikembalikan kepada pembuat amanah tetapi lama selepas kematiannya akan terangkum di bawah kematian tanpa berwasiat. Adalah hujahan perayu bahawa baki tanah sepatutnya diagihkan tanpa wasiat dan bukannya menjadi sebahagian baki estet pewasiat dalam wasiat. Sebaliknya, responden-responden telah memfailkan satu permohonan di bawah A. 14A KMT untuk menentukan beberapa persoalan undang-undang, iaitu, (i) sama ada tanah-tanah yang dipegang atas amanah oleh pemegang-pemegang amanah perlu dibahagikan kepada penerima-penerima legasi seperti dinyatakan dalam wasiat terakhir pewasiat; dan (ii) jika tanah-tanah itu diberikan kepada penerima-penerima legasi, keseluruhan tuntutan perayu ditolak dengan kos. Yang arif hakim menjawab permohonan responden-responden dalam bentuk afirmatif dan menolak permohonan perayu. Atas rayuan, Mahkamah Rayuan menolak rayuan perayu. Oleh itu, rayuan ini. Adalah hujahan perayu bahawa terdapat kepentingan yang masih belum dilupuskan apabila amanah tersebut berakhir pada 28 Mac 1983 dan kepentingan yang dipegang oleh responden-responden sebagai wasi adalah melalui amanah berbangkit. Isu yang timbul untuk pertimbangan dalam rayuan ini adalah sama ada klausa "residuary" dalam suatu wasiat merangkumi hartanah yang tidak dimiliki oleh pewasiat pada masa kematiannya.

Diputuskan (menolak rayuan dengan kos)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Untuk mengatasi sebarang perkara yang belum diputuskan berkenaan baki hartanah, kaedah undang-undang boleh digunakan, iaitu, dengan menggunakan peruntukan dalam wasiat yang dipanggil sebagai klausa "residuary" di mana baki hartanah akan dilupuskan. Klausa tersebut mengemukakan sebarang hartanah yang kekal, selepas semua hutang, cukai, perbelanjaan dan harta pusaka spesifik telah diselesaikan dengan sempurna. Klausa "residuary" sebegini memastikan bahawa baki hartanah pewasiat diagihkan kepada sesiapa yang beliau berhasrat untuk wasiatkan. Sebarang kegagalan untuk mendraf klausa "residuary" sebegitu atau klausa "residuary" yang komprehensif akan menyebabkan baki hartanah disalurkan melalui pewarisan tanpa wasiat.

(2) Pewasiat langsung tidak mengabaikan hartanah amanah, memandangkan beliau akan menjadi benefisiari bagi satu tapak pengebumian itu. Maka, kepentingan ekuiti masih kekal dengan pewasiat pada masa kematiannya, dan baki tanah boleh diwasiatkan melalui wasiatnya berikutan s. 3 Akta Wasiat 1959. Berdasarkan fakta, tanah berlebihan itu membentuk sebahagian baki estetnya dan dengan kewujudan klausa "residuary" sebegitu, baki tanah tersebut jatuh di bawahnya dan boleh diagihkan mengikut kehendak pewasiat. Kematian tanpa berwasiat dengan itu tidak berbangkit dalam kes ini, bukannya seperti dalam keadaan di mana wasiat tidak mempunyai rangka bakian menyebabkannya disalurkan melalui pewarisan tanpa berwasiat *(Re Wragg (deceased)*; dibezakan).

Case(s) referred to:

Dyer v. Dyer [1788] 2 Cox Eq Cas 92 ***(refd)***
Re Barne's Will Trusts [1972] 2 All ER 639 ***(refd)***
Re Lim Leng Cheak, deceased; Lim Eow Thoon v. Lim Keng Chuan & Anor [1969] 1 LNS 154 FC ***(dist)***
Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts [1971] Ch 1 ***(dist)***
Re Wragg (deceased) [1959] 2 All ER 717 ***(dist)***
Vandervell v. Inland Revenue Commissioners [1967] 2 AC 291 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14A, O. 71, O. 72, O. 80
Wills Act 1959, ss. 2, 3

Other source(s) referred to:

Halsbury's Laws of England, vol 17, para 1369
Lewin on Trusts, 18th edn, p 232
Shep Touch, 8th edn, p 399

For the appellant - M Athimulan (Norrizan Ahmad with him); M/s Athimulan & Co
For the respondents - Saw Lip Khai; M/s Chooi, Saw & Lim

[Editor's note: For the Court of Appeal judgment, please see David Wee Eng Siew v. Lim Lean Seng & Anor [2012] 1 LNS 616.]

Reported by Kumitha Abd Majid

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The plaintiff had filed encl. 25 pursuant to O. 80 of the Rules of the High Court 1980 ('the Rules') in the High Court for a decision on points of law namely:

(i) whether trust properties and still being trust properties at the time of the death of the settlor can be will out or in other words whether it has a depository effect; and

(ii) whether trust properties that resulted back to the settlor but long after his death, will fall under intestacy.

[2] The third and fourth defendants hereinafter referred to as the respondents, filed encl. 32 about six months after the filing of encl. 25 pursuant to O. 14A of the Rules, for the High Court to determine the matter on the following questions of law, namely:

(a) based on the last will of Lim Eow Thoon, deceased, dated 14 August 1976, indenture dated 17 September 1930 made between Tan Tay Seang, deceased as transferor and Lim Eow Thoon, deceased as confirmor and Lim Eow Hooi, deceased, Lim Keng Chuan, deceased, and Lim Seong Wah, deceased, as trustees and any other documents available, whether the lands that were held on trust by Lim Eow Hooi, deceased, Lim Keng Chuan, deceased and Lim Seong Wah deceased and thereafter goes back to Lim Eow Thoon, deceased, on the death of the last surviving trustee with the resulted back of the land affirmed by the Penang High Court in an order dated 9 January 1996 in Originating Summons No: 24-758-1995 with particulars of the land being stated in the Schedule in para. 23 in the amended statement of claim herein, has to be distributed to the residuary legatees stated in paras. 5 and 6 in the last will of the said Lim Eow Thoon or the said lands have to be distributed to all the lawful children or heirs of Lim Eow Thoon, deceased; and

(b) in the event the lands go to the residuary legatees, the plaintiff's whole claim herein be dismissed with costs.

[3] On 26 April 2012, the learned judge answered affirmatively the respondents' application under encl. 32 pursuant to O. 14A of the Rules, and dismissed the plaintiff's (hereinafter referred to as the appellant) application of encl. 25. Being aggrieved, the appellant filed an appeal to the Court of Appeal but lost there too. The appellant successfully obtained leave from the Federal Court on 20 November 2012 to have the following question determined by us, that is:

> In a case of wills, does a residuary clause include too property which the testator does not own at the time of his death.

Background Facts

[4] Real property, initially held by one Lim Leng Cheak (died on 10 February 1901), was vested on his widow ie, one Madam Tan in her own rights absolutely by the High Court in Penang on 21 December 1927 (*Re Lim Leng Cheak, deceased; Lim Eow Thoon v. Lim Keng Chuan & Anor* [1969] 1 LNS 154; [1969] 2 MLJ 228). By an indenture dated 24 March 1929 Madam Tan transferred the property to her son ie, Lim Eow Thoon (deceased), and *vide* an indenture dated 17 September 1930 the latter evinced an intention to create a trust. It was not disputed that the latter indenture was declared a valid private express trust by the courts. The properties involved in the trust were 13 pieces of land (the lands).

[5] The relevant parties involved in 17 September 1930 indenture were Tan Tay Seang (Madam Tan/deceased) the transferor of the first part, Lim Eow Thoon (deceased) as the testator of the second part, and Lim Eow Hooi (deceased), Lim Keng Chuan (deceased) and Lim Seong Wah (deceased) as trustees of the lands of the third part. The purpose of the trust as far as possible was to maintain and keep the lands as burial grounds, and out of the profits and income derived therefrom, to maintain and upkeep in good order and repair all graveyards and tombs then erected or thereafter to be erected on any part thereof. The lands as burial ground were for the use and benefit of the family and descendants of Lim Leng Cheak (the father of Lim Eow Thoon).

[6] There is no dispute that the trustees of the indenture were never to take the lands for their own benefit. The testator ie, Lim Eow Thoon (deceased) made his last will and testament on 14 August 1976 (the will) prior to his death on 8 September 1976. There were provisions in his will, in particular cls. 5 and 6, which provided for the legacy and distribution of the residuary properties not otherwise specifically devised or bequeathed.

[7] The last surviving trustee Lim Keng Chuan died on 28 March 1983. In 1996 the High Court at Penang *vide* its order dated 9 January 1996 pursuant to OS No: 24-758-1995 declared that the testator's trust expired on 28 March 1983 and the lands reverted and vested unto the executors cum trustees of the testator. The new executors cum trustees of the deceased testator are the current respondents. The order dated 9 January 1996 is an unchallenged evidence of the correctness of the facts supplied in the question for our determination. It is also an unchallenged evidence that pursuant to the High Court order the beneficial interest over the surplus land reverted to the testator, to be administered and acted upon by the new executors cum trustees. Apart from the order dated 9 January 1996 in the above case of *Re Lim Leng Cheak, deceased; Lim Eow Thoon v. Lim Keng Chuan & Anor* (*supra*) Suffian FJ earlier also made the following finding of facts:

> ... that the trust is only during the lives of the trustees and the life of the defendant (the sole surviving trustee) the trust will expire and the lands will revert to the plaintiff (ie, Lim Eow Thoon-explanation ours) ...

[8] The incontrovertible effect is that the order dated 9 January 1996, together with Suffian FJ's finding, firmly established that once the last surviving trustee died the trust would come to an end and the surplus land would revert to the testator. Returning to the current set of facts, when the last surviving trustee died, the plaintiff ie, the appellant, and also the administrator of the estate of one Lim Eang Tee, now deceased, surfaced and began to make demands. Lim Eang Tee was the daughter of Lim Eow Thoon and also the granddaughter of Lim Leng Cheak and thus was related to them.

[9] We now discuss why the demands arose. It transpired that a few plots of land still remained unused, in that there were still burial plots available (hereinafter referred to as surplus land), when the last surviving trustee died. Unlike the above scenario in *Re Lim Leng Cheak, deceased; Lim Eow Thoon v. Lim Keng Chuan & Anor* (*supra*), where the Federal Court held that the trust still subsisted despite the impossibility of performance of the trust over some of the lands, though not all, in the current case with the demise of the last surviving trustee, the trust folded up. The inevitable question then cropped up ie, what would happen now to the surplus land? It was therefore not unexpected that the appellant, also a descendent of Lim Leng Cheak through the lineage of Lim Eow Thoon here showed keen interest on the outcome of the surplus land and the eventual recipient or recipients. Aspiring for a share of the surplus land, the appellant filed the action on behalf of his late grandmother, Lim Eang Tee (deceased). He claimed that the surplus land should be distributed intestate rather than being part of the testator's residuary estate in the will. On the *locus* of his late grandmother Lim Eang Tee, being the daughter of the testator, her estate therefore was entitled to a share of the surplus land by reason of intestacy. If the surplus land were to fall under the will and distributable, the estate of Lim Eang Tee would be deprived of any part of it, hence the appellant's position.

[10] The respondents who are the current executors cum trustees of the testator's will and by virtue of it, disputed the appellant's claim on the premise that the surplus land ought to be distributed in accordance with the direction of the residuary clauses; these clauses excluded the appellant's grandmother's estate as a residuary legatee.

[11] At the High Court, the learned judge decided that the surplus land could be 'willed out' and distributed to the residuary legatee according to cls. 5 and 6 of the last will of Lim Eow Thoon. The court concluded that it was not an intestate property and answered questions (i) and (ii) of encl. 25 affirmatively. The learned judge held *inter alia* that:

> [12] Setelah menimbang hujahan pihak-pihak dan kertas-kertas kausa terlibat bagi Lampiran 25 dan Lampiran 32, dan mengambil panduan daripada kes *Re Lim Leng Cheak, decd; Lim Eow Thoon v. Lim Keng Chuan & Anor* [1969] 2 MLJ

228 yang mengatakan hartanah tersebut dikembalikan kepada Lim Eow Thoon di atas kematian pengamanah terakhir, yang juga melibatkan hartanah yang menjadi rujukan dalam kes di hadapan mahkamah ini, mahkamah ini berpendapat Lim Eow Thoon yang mendapat pengembalian semula (reverting) hartanah tersebut telah menjadikan hartanah tersebut sebagai harta yang boleh diwasiatkan oleh Lim Eow Thoon, simati tersebut. Pengembalian semula (reversion) ini tidak boleh ditafsirkan sebagai telah membentuk 'resulting trust'.

[13] Oleh yang demikian, mahkamah ini menjawab persoalan di perenggan 1(a) Lampiran 32 oleh defendan secara affirmative bahawa harta pesaka atau estet tersebut boleh diwasiatkan dan dibahagikan kepada penerima-penerima legasi mengikut perenggan 5 dan 6 wasiat terakhir Lim Eow Thoon tersebut dan tidak menjadi harta tak berwasiat.

[12] Being dissatisfied with the High Court's decision the appellant appealed to the Court of Appeal. The appellant's argument was not dissimilar to that ventilated at the High Court. At the Court of Appeal, in response, the respondents argued that Lim Eow Thoon had made a gift of the lands for the purpose of burial grounds for the family and descendants of Lim Leng Cheak (including him). Any surplus would revert to the testator as a remainderman, meaning his estate possessed the remainder interest, after the expiry of the trust. With the legal interest returned the surplus land could be distributed as outlined by cls. 5 and 6.

[13] On 6 July 2012 the Court of Appeal dismissed the appeal, *inter alia*, in this manner:

The ruling of the Learned Judge that the subject asset fell to be distributed in accordance with the wishes of the deceased expressed in his will is the correct decision.

…

There is clear authority for the proposition that a testator can include in his will property of which he is not aware.

Some General Discussion Over The Case

[14] In this appeal some discussion of wills, residuary dispositions or issues pertaining to trusts cannot be avoided. Let us start with the will. In its simplest version, a will is a written declaration of a person's intent to distribute his property after his death. It is also

called the last will and testament and through it title to property may be transferred. As the purpose of the testator of a will is to distribute property the main element of a will therefore must be property but necessitating him being the owner. Without the existence of ownership rights over the property he would not be able to will it (*Wills, Trusts and Estates Administration* 3rd edn. by Suzan D Herskowitz).

[15] We now peruse some of the views of authorities on wills. *Shep Touch* (8th edn.) at p. 399 authors that a will or testament is the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect on or after his death. *Halsbury's Laws of England on Wills* also states that all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the interests respectively may be become vested and whether he may be entitled to them under the instrument by which they were created or under any disposition of them by deed or will under intestacy, may be disposed by will.

[16] When a person dies leaving a will, the executor will prove such will in the High Court. The law is provided for in the Probate and Administration Act 1959. The procedure is provided for in O. 71 (for non-contentious probate proceedings) and O. 72 (for contentious probate proceedings) of the Rules of the High Court 1980. Having obtained probate it is the executor's duty to administer the estate according to the will.

[17] There will be a situation where a person dies without any will. This means he dies intestate ie, having died without executing a legal will. The want of a will may result in some unintended consequences like uncertainties for minors, squabbles over property or even unwillingness of a person to handle the distribution of the estate assets.

[18] As stated above, through the will the testator will attempt to dispose of his property to specified members of his family, heir or even friends. It is not unusual of a situation where there may be certain properties, either by oversight or not that has yet to be addressed for distribution purposes. As in the current appeal, when the testator executed the will on 14 August 1976, he surely could not have anticipated that by the time the last surviving trustee died on 28 March 1983 there would be the surplus land.

[19] To overcome any unfinished business of residual property a legal method may be devised ie, by the usage of provisions in the will called the residuary or residue clause whereupon the remaining property will be disposed of. How the residuary clause is to be worded and given the necessary meaning or intention will be left to the ingenuity of the testator or his solicitor. Such a residuary clause therefore addresses any remaining property, after all the debts, taxes, expenses, and specific bequests and devises have been fully satisfied. This residuary clause ensures that the remainder of the testator's property is distributed to the person or persons he intends to bequest.

[20] Any personal property disposed of is specifically called a residuary legacy because this type of disposition merely distributes the testator's personal property. Property that comes into the estate after the death of the testator such as insurance proceeds, refunds, court settlement, asset the testator overlooked to include in the distribution, legacies that have lapsed or assets the testator may have acquired after executing the will, may be devised through the above discussed residuary clause. It is a catch-all net that may include a considerable amount of property in many cases.

[21] Any failure to draft such residuary clause or a comprehensive residuary clause will cause the remainder of his property to pass by intestate succession, a result that may not be the desire of the testator. In other words, the residuary estate will pass to all the heirs at law as intestate property as stated earlier ie, in accordance with the Distribution Act 1958 (see *Re Barne's Will Trusts* [1972] 2 All ER 639).

[22] Without the need for legal activism, in Malaysia, the definition of will is wide enough to accommodate any residuary clause in a will, and in this case for the surplus land. Section 2 of the Wills Act 1959 provides a rather expansive definition for it and reads as follows:

S.2 Interpretation and application

(1) In this Act, unless there is something repugnant in the subject or context-;

...

> "will" means a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or writing in the nature of a will in exercise of a power and also disposition by will or testament of the guardianship, custody and tuition of any child.

[23] It is also established law that before the death of the testator the contents of his will may be changed as many times as he likes, with his intentions stated in the will legally binding only when he dies.

[24] To lay claim over the surplus land the appellant argued in this manner:

> The lands were given by Lim Eow Thoon to the trustees to be held on trust and hence were not a life estate or reversionary interest or a remainderman but an express private trust. The law of trust therefore applies ie, when a trust fails or the trust declared does not exhaust the whole beneficial interest, a resulting trust arises in favour of the settlor. It was further submitted that there was an interest remaining undisposed of when the trust came to an end on 28 March 1983 (after the death of the last trustee), interest that was held on trust by the first and second respondents as executors cum trustees by way of a resulting trust.

[25] The law on resulting trust is very much based upon the English case of *Dyer v. Dyer* [1788] 2 Cox Eq Cas 92 at p. 93 where Eyre CB said:

> ... trust of a legal estate ... results to the man who advances the purchase money.

[26] The circumstances under which property will become subject of a resulting trust were examined by the House of Lords in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669. Lord Browne-Wilkinson identified two circumstances in which a resulting trust would arise:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in joint names of A and B, there is a presumption that A did not intend to make a gift to B; the money

> or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchaser by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer ... (B) Where A transfers property to B on express trust but the trusts declared do not exhaust the whole beneficial interest ...

[27] How then could a resulting trust have arisen when the property was transferred to the trustees despite the trust having failed to exhaust the beneficial interest? Unless the testator still had some residual equitable interest a resulting trust surely could not arise. The above poser was answered satisfactorily by the clarification in *Vandervell v. Inland Revenue Commissioners* [1967] 2 AC 291 where it held that where a testator transfers property to a trustee without the intention to benefit the trustees absolutely, the beneficial interest in the lands would remain with the testator. Lord Wilberforce when clarifying remarked, "But the equitable, or beneficial interest, cannot remain in the air: the consequence of the law must be that it remains in the settlor." Lord Upjohn in the same vein also remarked that the beneficial interest notwithstanding his express intention and belief that he has parted with his whole beneficial interest in the property will still 'inevitably remain in him'. *Lewin on Trusts* (18th edn.) summed it up at p. 232 when it authored that 'there may never be a transfer of the equitable interest, where ownership of the property is never validly transferred'.

[28] The respondents submitted that the surplus land could be 'willed out' as disposals falling under valid residuary clauses are envisaged by s. 3 of the Wills Act 1959. This provision which provides for the disposal of property reads as follows:

> S.3 Property disposable by will
>
> Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will.

[29] Obviously under the above provision a testator statutorily may devise, bequeath or dispose of by his will properties owned or to which he is entitled either at law or in equity at the time of his death notwithstanding being entitled to the properties only after the execution of the will. With the equitable rights of the testator remaining with him at the time of the making of the will, what with it now being quite settled that all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not have ascertained the recipients, may dispose of that property by will (*Vandervell v. Inland Revenue Commissioners* (*supra*); *Halsbury's Laws of England on Wills* (*supra*)).

[30] We noted the respondents' strong objection when they canvassed that the real issue before the court was whether the surplus land, which was held on trust for the testator's estate by the executors cum trustees, could be considered properties capable of being devised and passed by his will dated 14 August 1976. If the answer were in the affirmative the appellant would have to abandon any hope of receiving the residue by intestacy as argued.

[31] To follow the argument of the respondents a need arises for us to look at the contents of the will. A cursory look at the will dated 14 August 1976 revealed that residuary clauses were provided for as reflected by cls. 5 and 6. For ease of reference the two clauses are reproduced below:

> 5. I devise and bequeath all the residue of my real and personal estate whatsoever and where so ever not hereby or by any codicil hereto otherwise specifically disposed of unto my Trustees upon Trust to sell, call in and convert the same into money with power to postpone such sale or conversion.
>
> 6. Out of my ready moneys and the moneys to arise from such sale calling in and conversion as aforesaid my Trustees shall pay or provide for my debts funeral and testamentary expenses and the said legacies as hereinbefore contained and subject thereto my Trustees shall invest in any investments authorized by law and stand possessed of such investments and of all parts of my estate for time being unsold (hereinafter called residuary estate) upon the following trusts:
>
> (a) Upon trust to pay unto my wife Khoo Ah Chee during her life and as long as she remain unmarried the monthly sum of RM150/- per month.

(b) After the death or remarriage of my wife Khoo Ah Chee upon trust to divide both capital and income for my daughter Lim Seng Lan, my grandsons Lim Lean Teik, Lim Lean Hin and Lim Lean Sen in equal shares.

Our Factual Finding

[32] Apart from the obvious fact that the testator never totally abandoned the trust property, as he too would eventually be a beneficiary of a burial plot, let alone the lands were not absolutely for the trustee legally, the testator still retained his equitable interest (*Vandervell v. Inland Revenue Commissioners* (*supra*)). In comparison, in the case of *Re West Sussex Constabulary's Widows, Children and Benevolent* (1930) *Fund Trust*s [1971] Ch 1 the contributors had parted with their monies out-and-out when they participated in the sweepstakes, entertainments and raffles. Returning to this appeal, the moment the trust folded up, the respondents' new executors cum trustees would pass on the surplus land to the beneficiaries in accordance with cls. 5 and 6. Had there been no residuary clauses the surplus land would be distributed in accordance with the rules of intestacy provided for in the Distribution Act 1958.

Decision

[33] To reiterate, given that the equitable interest remained with Lim Eow Thoon at the time of his death, and the surplus land could be bequeathed and devised by his will pursuant to s. 3 of the Wills Act 1959, we hold that the surplus land formed part of his residual estate. With such comprehensive residuary clauses provided for, the surplus land fell under them, and thus distributable in accordance with the wishes of the testator. Intestacy therefore has no place in this case, unlike a situation where a will contains no residuary devise causing it to pass on intestate (*Halsbury's Laws of England* vol. 17 para. 1369).

[34] In the course of his submission the appellant brought to our attention the case of *Re Wragg (deceased)* [1959] 2 All ER 717 in support of his case. In this case a will was executed and a trust set up bequeathing certain properties to his wife. The testator had directed that income be paid to his wife on a weekly basis during her lifetime. A question arose there as to how surplus income arising during her lifetime ought to be dealt with. It was held that

A the surplus income during the widow's lifetime was not dealt with by the will and it devolved onto the testator's intestacy. Having scrutinised the above case we conclude that it is distinguishable to the current matter before us. The residuary clauses in this appeal had covered every situation and left nothing to be disposed
B of intestate as opposed to the above case. The Court of Appeal in this appeal adequately put it in the following manner:

> We opine ... the will of the deceased had a comprehensive residue clause providing for "all the residue of my real and personal
C estate whatsoever and wheresoever not hereby or any codicil here to otherwise specifically dispose of" to his trustees and for them to distribute the residue of his estate among his named beneficiaries.

[35] As regards the question posed for our determination in its
D original form the answer would be in the negative.

[36] We therefore dismiss this appeal with costs.

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